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Yusri bin Pialmi v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05-93 OF 2007
LOW HOP BING, KANG HWEE GEE AND AZHAR MA'AH JJCA
30 DECEMBER 2009

C

Criminal Law — Dangerous Drugs Act — s 39B(1)(a) — Trafficking — Whether established — Prosecution relying solely on evidence of arresting officer — Whether arresting officer found to be witness of truth

D

Evidence — Adverse inference — Failure of prosecution to call witness — Drug trafficking charge — Failure of prosecution to call other members of police raiding party or offer them to defence as witnesses — Whether amounted to withholding or suppression of evidence — Whether ground to raise adverse inference — Evidence Act 1950 s 114(g)

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Acting on information received regarding drug trafficking activities along Jalan Besar, Taman Saujana, Johor Bahru, where a male Malay by the name of Yus would be involved between 6 and 8pm, SP2, the arresting officer, and his police party proceeded to the said area and kept watch. SP2 spotted the accused/appellant coming out of a lane by the side of the road, holding a

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plastic bag in his right hand. When SP2 introduced himself as police, the accused attempted to flee with his plastic bag but was arrested after a commotion. The plastic bag was found to contain cannabis weighing 1850.21g. The accused was charged of an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The defence claimed that the prosecution had

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relied exclusively on the evidence of SP2 but took no further steps to call other members of the police party nor offered them to the defence as witnesses. As such the defence invoked s 114(g) of the Evidence Act 1950. The accused was convicted and sentenced to death and hence this appeal.

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Held, dismissing the appeal and affirming the conviction and sentence:

(1) (per **Low Hop Bing JCA**) The court was unable to attribute to the prosecution any conduct of withholding or suppression of evidence. In fact SP2's evidence had revealed the names of all the members of the

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police party engaged in the raiding operation. There was no concealment whatsoever. The court therefore had no difficulty in holding that s 114(g) was inapplicable (see para 17).

(2) (per **Low Hop Bing JCA**) The learned trial judge had the audio visual advantage and had indeed found SP2 to be a witness of truth. SP2 was

not an interested witness, but a police officer performing his duties. He had related to the trial court what he actually saw and did on that day. In the absence of any contradiction by other witness or being shaken in cross-examination, it was proper and correct for the learned trial judge to arrive at his specific finding of facts. The evidence of SP2 as a police witness was not inherently improbable (see para 18).

(3) (per **Kang Hwee Gee JCA**, dissenting) On the evidence as presented before the High Court, the learned judge was not bound to draw any adverse inference on the decision of the prosecution in not calling other witness present at the scene and he was at liberty to rely only on the evidence of one witness with respect to the recovery of the drug to convict the accused (see para 21).

(4) (per **Kang Hwee Gee JCA**, dissenting) The unsatisfactory feature of the trial however, rested on the conduct of the prosecution in not offering to the defence the witnesses it did not call at the close of its case without assigning any reason. These witnesses had given statements and were on the witness list which had been supplied by the prosecution to the defence and the court and they included members of the arresting party who if called, might be able to describe how the drugs were recovered from the accused. Their evidence was all the more important in view of the fact that only one witness was called by the prosecution to describe how the drug was recovered which was disputed by the accused (see para 22).

(5) (per **Kang Hwee Gee JCA**, dissenting) It has always been the practice that the prosecution at the close of its case, offer or make available to the defence, witnesses whom it did not call to give evidence but whose statements had been recorded in the course of police investigation. The practice has the force of procedural law to ensure that an accused is afforded all the means at his disposal to call any witness to testify on his behalf. The prosecution's failure in not offering or making them available under the circumstances has given rise to the question of whether the accused had been afforded a fair trial. The omission on the part of the prosecution to offer or make available witnesses which they had laid claim to but did not call to give evidence had occasioned a failure of justice which could not be cured under s 422 of the Criminal Procedure Code (see paras 23 & 35).

[Bahasa Malaysia summary

Bertindak atas informasi yang diterima berkenaan dengan aktiviti pengedaran dadah di sepanjang Jalan Besar, Taman Saujana, Johor Bahru, di mana seorang lelaki Melayu bernama Yus akan terlibat di antara pukul 6 dan 8 malam, SP2, pegawai tangkapan, dan pasukan polisnya, menuju ke kawasan tersebut dan membuat pemerhatian. SP2 ternampak tertuduh/perayu keluar

daripada lorong di tepi jalan tersebut, memegang satu beg plastik di tangan kanannya. Apabila SP2 memperkenalkan dirinya sebagai polis, tertuduh mencuba untuk melarikan diri dengan beg plastik tersebut tetapi ditangkap selepas sedikit kekecohan. Beg plastik tersebut didapati mengandungi kanabis seberat 1850.21g. Tertuduh dituduh dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Pihak pembelaan menyatakan bahawa pihak pendakwaan telah menyandar secara eksklusif atas keterangan SP2 tetapi tidak mengambil langkah selanjutnya untuk memanggil ahli-ahli lain pasukan polis dan juga tidak menawarkan mereka kepada pihak pembelaan sebagai saksi. Oleh itu pembelaan membangkitkan s 114(g) Akta Keterangan 1950. Tertuduh disabitkan dan dihukum mati. Maka rayuan ini.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) (oleh **Low Hop Bing HMR**) Mahkamah tidak boleh mengatakan apa-apa mengenai tindakan pihak pendakwaan menahan atau menyekat keterangan. Sebenarnya, keterangan SP2 telah mendedahkan nama-nama kesemua ahli pasukan polis yang terlibat dalam operasi rampasan tersebut. Tidak ada apa-apa penyembunyian. Mahkamah oleh itu tidak ada masalah memutuskan bahawa s 114(g) tidak beraplikasi (lihat perenggan 17).

(2) (oleh **Low Hop Bing HMR**) Hakim bicara yang bijaksana yang mempunyai faedah audio visual dan sememangnya mendapati SP2 sebagai saksi yang benar. SP2 bukan saksi yang berkepentingan, tetapi seorang pegawai polis yang menjalankan tugasnya. Beliau telah menyatakan kepada mahkamah perbicaraan apa yang beliau sebenarnya lihat dan lakukan pada hari tersebut. Dalam ketiadaan apa-apa penyanggahan oleh saksi lain atau digugat dalam pemeriksaan balas, ia adalah wajar dan betul bagi hakim perbicaraan yang bijaksana untuk membuat penemuan fakta yang spesifik tersebut. Keterangan SP2 sebagai saksi pihak polis bukan tidak munasabah (lihat perenggan 18).

(3) (oleh **Kang Hwee Gee HMR**, menentang) Berdasarkan keterangan yang dikemukakan di Mahkamah Tinggi, hakim yang bijaksana tidak terikat untuk membuat anggapan bertentangan terhadap keputusan pihak pendakwaan untuk tidak memanggil saksi lain yang ada di tempat kejadian dan dia berhak untuk menyandar atas keterangan serang saksi berkaitan dengan perampasan dadah untuk mensabitkan tertuduh (lihat perenggan 21).

(4) (oleh **Kang Hwee Gee HMR**, menentang) Bahagian yang tidak memuaskan dalam perbicaraan tersebut, walau bagaimanapun, terletak pada tindakan pihak pendakwaan yang tidak menawarkan kepada pihak pembelaan, saksi-saksi yang tidak dipanggilnya di akhir kesnya tanpa memberikan sebarang alasan. Saksi-saksi ini telah memberikan kenyataan dan tersenarai dalam senarai saksi yang telah diberikan oleh

pihak pendakwaan kepada pihak pembelaan dan mahkamah dan mereka termasuk ahli-ahli pasukan tangkapan yang jika dipanggil, mungkin boleh menggambarkan bagaimana dadah didapati daripada tertuduh. Keterangan mereka adalah lebih penting memandangkan fakta bahawa hanya seorang saksi yang dipanggil oleh pihak pendakwaan untuk menggambarkan bagaimana dadah didapati yang tidak dipertikaikan oleh tertuduh (lihat perenggan 22).

(5) (oleh **Kang Hwee Gee HMR**, menentang) Adalah amalan biasa bahawa pihak pendakwaan di akhir kesnya, menawarkan atau memberikan kepada pihak pembelaan, saksi-saksi yang ia tidak panggil untuk memberikan keterangan tetapi yang mana keterangannya telah diambil semasa penyiasatan polis. Amalan tersebut mempunyai kuat kuasa undang-undang prosedur untuk memastikan bahawa seseorang tertuduh diberikan kesemua peluang yang ada untuk memanggil saksi-saksi untuk memberikan keterangan bagi pihaknya. Kegagalan pihak pendakwaan untuk menawarkan atau memberikan mereka dalam keadaan ini membangkitkan persoalan sama ada tertuduh telah diberikan perbicaraan yang adil. Ketinggalan oleh pihak pendakwaan untuk menawarkan atau memberikan saksi-saksi yang mereka sandarkan tuntutan tetapi tidak dipanggil untuk memberikan keterangan telah menjurus kepada kegagalan keadilan yang tidak boleh diperbaiki di bawah s 422 Kanun Prosedur Jenayah (lihat perenggan 23 & 35).]

Notes

For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 167–179.

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Adel Muhammed el Dabbah v Attorney General Palestine [1944] AC 156, PC (refd)
Jazuli bin Mohsin v PP [1990] 2 MLJ 190, HC (refd)
Khoon Chye Hin v PP [1961] MLJ 105, CA (refd)
Kiew Foo Mui & Ors v PP [1995] 3 MLJ 505, FC (refd)
Lee Kuan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631 (refd)
Lee Lee Chong v PP [1998] 4 MLJ 697, CA (refd)
Madheshwardhari Singh and Anor v State of Bihar AIR 1986 (Pat) 324 (refd)
Mraz v R (1955) 93 CLR 439 (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 (refd)
PP v Mansor Md Rashid & Anor [1997] 1 CLJ 233, FC (refd)

A *PP v Mohamed Ali* [1962] MLJ 257, HC (refd)
PP v Tan Kok An [1996] 1 MLJ 89, HC (refd)
PP v Teh Cheng Poh [1980] 1 MLJ 251, HC (refd)
Queen, The v Law Loi On Criminal Appeal No 663/94 (refd)
B *Richardson & Others v The Queen* (1974) 131 CLR 116, HC (refd)

Legislation referred to

Criminal Appeal Act 1912 [AU] s 6
Dangerous Drugs Act 1952 s 39B(1)(a), (2),
C Evidence Act 1950 ss 40(1), 114(g)
Federal Constitution art 5

Appeal from: Criminal Trial No 42–62 of 2005 (High Court, Johor Bahru)

D

Shaik Saleem (Shaik Adam & Co) for the appellant.
Suzana Atan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

E **Low Hop Bing JCA:**

APPEAL

F **[1]** On 10 October 2007, the appellant ('the accused') was convicted of the offence of trafficking in 1850.21g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952, and sentenced to death under s 39B(2) thereof. (A reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952, unless otherwise stated).

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[2] On 11 November 2009, after hearing the accused's appeal, we arrived at a majority judgment in which Azhar Ma'ah JCA and I concurred, while Kang Hwee Gee JCA dissented. The majority had dismissed the accused's appeal, and affirmed the decision of the learned trial judge. The grounds of
H the majority judgment now follow.

FINDING OF FACTS

[3] The learned trial judge's finding of facts may be briefly stated.

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[4] On 25 February 2005, at about 4pm, the arresting officer ('SP2') received information pertaining to drug trafficking activities along Jalan Besar, Taman Saujana, Johor Bahru, where a male Malay by the name of Yus would be involved between 6 and 8pm.

[5] Acting on this information, SP2 and his police party proceeded by car to the target place at about 6.30pm. They arrived there at 7pm.

[6] SP2 remained in the car which was parked by the side of the road. He kept watch, while his men took their respective positions at designated places.

[7] Subsequently, SP2 spotted a male Malay who was identified as the accused, coming out of a lane by the side of the road. The accused was holding a plastic bag in his right hand. Apart from the accused, no one else emerged from the road. SP2 and his men approached the accused and detained him. When SP2 introduced himself as police, the accused attempted to flee with his plastic bag. A commotion ensued between the accused and the police party. The accused was then arrested by SP2 and his men.

[8] The plastic bag was found to contain two slabs of compressed dried leaves which, upon analysis by the government chemist, was confirmed as cannabis weighing 1850.21g.

SECTION 114(g) OF THE EVIDENCE ACT 1950

[9] In raising this central and sole issue, learned defence counsel Mr Shaik Saleem submitted that throughout the entire case, the accused had denied that he had been detained and the drug was not with him at the material time. In this regard, he added that the prosecution had relied exclusively on the evidence of SP2 but took no further steps to call other members of the police party nor offered them to the defence as witnesses. He asked the court to invoke s 114(g). He cited *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 (SC); and *Public Prosecutor v Tan Kok An* [1996] 1 MLJ 89 (HC) in support thereof.

[10] Ms Suzana bt Atan, learned deputy public prosecutor, responded as follows:

(a) Even without offering witnesses from the police raiding party, the prosecution's case is complete with the evidence of SP2; and there is no miscarriage of justice as evidence for the prosecution is credible and ought to be believed, in view of:

(i) *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 (HC); and

(ii) *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251 (HC);

(b) There is no withholding or suppression of material evidence and so s 114(g) does not apply, on the basis of:

A (i) *Public Prosecutor v Mansor Md Rashid & Anor* [1997] 1 CLJ 233 (FC);

(ii) *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC);

(iii) *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 (CA);

B (iv) *Lee Lee Chong v Public Prosecutor* [1998] 4 MLJ 697 (CA); and

(v) *Jazuli bin Mohsin v Public Prosecutor* [1990] 2 MLJ 190 (HC).

[11] As the central and core issue raised in the instant appeal revolves C around the interpretation and ambit of s 114(g), it is pertinent for us to embark upon an analysis of the authorities cited for the defence and the prosecution.

[12] A good starting point is to be found in *Khoon Chye Hin*, where at D p 109B left, Thomson CJ (later LP), speaking for the (then) Court of Appeal, approved of the trial judge's statement to the effect that you can draw no inference against the prosecution from the fact that the prosecution had not called a particular witness. The learned Chief Justice emphasised that provided there is no wrong motive in a criminal case, prosecuting counsel has E a discretion whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth.

[13] In *Mansor Md Rashid* at pp 253 and 254, Chong Siew Fai CJ (S&S) F (as he then was) held that the drawing of adverse inferences pursuant to s 114(g) is not a matter of an inflexible rule but depends on the circumstances of each particular case. The question to consider is whether the existence of a fact or state of things makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary G according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognised mode of proving it, and the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned. Hence, no adverse inferences should be drawn against the prosecution for the H non-production of two persons viz Cholar and Amran there, as they were not material to the point in issue, as the basis of the prosecution's case to substantiate the charge was on the 'sale of cannabis resulting from negotiations'.

I **[14]** Section 114(g) may however be invoked eg in *Tan Kok An* where an important witness, the 'umbilical cord to link the accused with the heroin', and another person Sow Kiong, whom the prosecution had featured in cross-examining the accused, were not called as prosecution witnesses: per Abdul Malik Ishak J (now JCA).

[15] In *Abdullah Zawawi* at the trial, there were some unsatisfactory features showing that the case against the accused fell short of proof beyond reasonable doubt. Two witnesses, viz the assistant manager and the office boy, were not called as prosecution witnesses. At pp 18 and 19, Salleh Abas LP (as he then was) held that where the prosecution evidence falls short of proving a prima facie case, the right not to call such witnesses and to make them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters at the trial, the prosecution must close this gap. It is not for the defence to call or use offered witnesses to supplement the prosecution's case. Hence, the prosecution's right not to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof. See also *Jazuli bin Mohsin*, Wan Yahya J (later SCJ).

[16] In *Munusamy,* Mohamed Azmi SCJ (as he then was) in delivering the judgment of the (then) Supreme Court stressed that it is essential to appreciate the scope of s 114(g), lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is *withholding or suppression of evidence* and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but *material document* by a party in his possession, or for non-production of not just any witness but an *important and material witness to the case*. (Emphasis added). The Supreme Court held that adverse inference under s 114(g) does not apply to:

(a) the failure by the prosecution to call an informer who was protected under s 40(1) (see also *Lee Lee Chong*);

(b) the prosecution's dispensation with the calling of the typist to explain the typing error on the envelope containing the chemist report which was addressed to the OCPD 'Sungai Siput' and not to the OCPD 'Taiping' ie the place of the offence, since the error had been explained by the investigating officer and the government chemist; and

(c) non-production of the chemist's certificate of testing the weighing instrument, when there was a certificate dated 31 May 1985 from the Inspector of Weights and Measures.

[17] Reverting to the instant appeal, we observed that learned defence counsel has noticeably refrained from suggesting the existence of the essential element of withholding or suppression of evidence by the prosecution. Indeed, we are unable to attribute to the prosecution any conduct of withholding or suppression of evidence. In fact SP2's evidence has revealed the names of all the members of the police party engaged in the raiding operation. There was no concealment whatsoever. We therefore had no

A difficulty in holding that s 114(g) was inapplicable.

CREDIBLE EVIDENCE

B **[18]** The learned trial judge had the audio visual advantage and had indeed found SP2 to be a witness of truth. SP2 was not an interested witness, but a police officer performing his duties. He had related to the trial court what he actually saw and did on that day. In the absence of any contradiction by other witness or being shaken in cross-examination, it was proper and correct for C the learned trial judge to arrive at his specific finding of facts. He is entitled to do so: see eg *Teh Cheng Poh*, per Gunn Chit Tuan J (later CJ(M)) at p 253. The evidence of SP2 as a police witness is not inherently improbable. Such evidence must in the first instance be accepted, as SP2 was not saying that he saw a cow jumping over the moon: per Thomson CJ (later LP) in *Mohamad* D *Ali*.

CONCLUSION

E **[19]** On the foregoing grounds, we dismissed this appeal and affirmed the conviction and sentence.

Kang Hwee Gee JCA (delivering dissenting judgment):

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[20] I have read the judgment of my learned brother Low Hop Bing JCA in draft and I agree entirely with the principle of law expounded therein with respect to the drawing of adverse inference under s 114(g) of the Evidence Act 1950 and the conclusion reached that no such inference can be drawn.

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[21] On the evidence as presented before the High Court, I fully agree that the learned judge was not bound to draw any adverse inference on the decision of the prosecution in not calling other witness present at the scene H and that he was at liberty to rely only on the evidence of one witness with respect to the recovery of the drug to convict the accused.

[22] The unsatisfactory feature of the trial however, rests not on whether adverse inference should be drawn, but on the conduct of the prosecution in I not offering to the defence the witnesses it did not call at the close of its case without assigning any reason. These witnesses had given statements and were on the witness list which had been supplied by the prosecution to the defence and the court and they included members of the arresting party who if called, might be able to describe how the drugs were recovered from the accused.

Their evidence was all the more important in view of the fact that only one witness was called by the prosecution to describe how the drug was recovered which was disputed by the accused.

[23] It has always been the practice that the prosecution at the close of its case, offer or make available to the defence, witnesses whom it did not call to give evidence but whose statements had been recorded in the course of police investigation. The practice has the force of procedural law to ensure that an accused is afforded all the means at his disposal to call any witness to testify on his behalf. The prosecution's failure in not offering or making them available under the circumstances has given rise to the question of whether the accused had been afforded a fair trial. It is a threshold issue affecting jurisdiction which may render the trial invalid.

[24] There is a dearth of local authorities with respect to the duty of the prosecution to offer to the defence witnesses from whom statements have been taken but are not called to testify and the consequence that may arise. It may be necessary to refer to case law from other common law jurisdictions which may provide persuasive authority on the issue.

[25] The High Court of Australia (on appeal from the Supreme Court of the Australian Capital Territory) in *Richardson & Others v The Queen* (1974) 131 CLR 116 (Barwick CJ McTiernan and Mason JJ) confirmed the well accepted general principle already known in our jurisdiction that the prosecution has a wide discretion to call to trial witnesses from whom statements had been taken and that the defence cannot dictate the conduct of the prosecution case and that its decision not to call a particular witness can constitute a ground to set aside a conviction in favour of a new trial only if it can be construed as a misconduct which gave rise to a miscarriage of justice. The court went on to approve what the Privy Council said of the duty of the prosecutor in *Adel Muhammed el Dabbah v Attorney General Palestine* [1944] AC 156 at p 169 that:

> It is consistent with the discretion of counsel for the prosecutor, which is thus recognised, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence, and this practice has become even more general in recent years, and rightly so, but it remains a matter for the discretion of the prosecutor.

[26] In the Hong Kong Court of Appeal case of *The Queen v Law Loi On* Criminal Appeal No 663/94, Law was charged with the offence of wounding one of three brothers who had visited a flat on the first floor of a building. Evidence was presented by the prosecution that Law had knifed one of the brothers and had called upon persons in the flat to arm themselves. Law

A denied the prosecution's account of the event, claiming instead that it was the brothers who came to the flat armed with knives and that they had chased after him.

B [27] Statements were recorded from three persons who were with Law at the flat which supported his account. Their statements were included in a bundle sent to counsel for the accused and witnesses summons were issued which led the defence to believe that they would be called to give evidence at the trial. The prosecution decided not to call them to give evidence but only informed the defence of its intention on the day of hearing just before the C trial began.

[28] The court (Mortimer and Mayo JJA and Keith J) accepted the principle in *Richardson*. However, it went a step further to examine the D conduct of the prosecution in offering the witnesses to the defence at the eleventh hour, the effect of which was to deny the defence the opportunity to interview the witnesses and to decide whether to call them. It found that the prosecution had in fact *laid claim* to the witnesses. To *lay claim* in the context of the criminal trial procedure obtaining in Hong Kong meant, listing names E of the witnesses in the back of the indictment of trials in the High Court or of the summary of facts in trials in District Court or informing the judge of its intention to call the witnesses at the pre-trial stage, or generally leading the defence to believe that it had *laid claim* to such witnesses.

F [29] It held that in such a case where the prosecution had laid claim to witnesses, it must call them or at least offer them for cross-examination save where it is plain from the statement recorded that they were not credible witnesses. Its failure to call them to give evidence was under the circumstance a material irregularity in the course of the trial.

G [30] The rationale for the judgment is to be found at para 15 per Keith J:

> However, once the decision has been relayed to the defence different considerations apply. Since the prosecution has 'laid claim' to that witness, the defence is unlikely to contemplate taking a statement from the witness, and will not make any H arrangements to bring the witness to court. Thus where the prosecution has notified the defence of its intention to call a particular witness (for example, by naming the witness on the back of the trial in the High Court), it becomes the duty of the prosecution to call that witness, even though the evidence which he is going to give is inconsistent with the case which the prosecution has to prove. The I prosecution has a discretion as to whether it examines that witness or merely tenders him for cross-examination, though that discretion must be exercised in a manner which is fair to the defence and is calculated to further the interest of justice. The only exception to the rule requiring the prosecution to call such a witness is where it appears to counsel for the prosecution that the witness is no longer a credible witness worthy of belief.

[31] The cases illustrate the extent to which courts subscribing to the adversarial system of trial under the common law are prepared to intervene, to ensure that an accused receives a fair trial. The practice of making available or offering witnesses to the defence at the close of the case for the prosecution goes far beyond *invoking the often-quoted presumption of adverse inference under s 114(g) of the Evidence Act* as alluded to by Salleh Abas LP in *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 at p 18. It primarily meant to ensure that an accused person facing trial in a court of justice is afforded all reasonable means and opportunity to defend himself by calling any witness to testify on his behalf who may support his innocence.

[32] Indeed, the right to a fair trial exists not only in the abstract mind of judges. It was found by the Federal Court recently, in *Lee Kuan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (Richard Malanjum CJ Sabah & Sarawak, Hashim Yussof FCJ and Gopal Sri Ram FCJ) to reside in art 5 of the Federal Constitution, at para 18:

> Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by art 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal. Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case.

[33] The Federal Court referred to and approved what Edgar Joseph Jr J (as he then was) said on the subject in the following passage of his judgment in *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329:

> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia CJ in *Madheshwardhari Singh v The State* (*Madheshwardhari Singh and Anor v State of Bihar* AIR 1986 (Pat) 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

[34] The issue before the Federal Court in *Lee Kwan Woh* was the denial of the right of the accused to make at the close of the case for the prosecution a submission of no case to answer which the Federal Court found for the defence. A fortiori, in the instant case which turns on the failure of the

prosecution to offer or make available witnesses who would be able to give evidence with respect to the recovery of the drugs given that only one of the many in a group of police officers who witnessed the unfolding of the narrative gave evidence.

[35] The omission on the part of the prosecution to offer or make available witnesses which they had laid claim to but did not call to give evidence in my considered view has occasioned a failure of justice which cannot be cured under s 422 of the Criminal Procedure Code. The Federal Court in *Kiew Foo Mui & Ors v Public Prosecutor* [1995] 3 MLJ 505, found the expression *failure of justice* in s 422 of the Criminal Procedure Code synonymous with *miscarriage of justice*. It approved of what Fullagar J of the High Court of Australia said of an equivalent provision in s 6 of the New South Wales Criminal Appeal Act 1912 in *Mraz v R* (1955) 93 CLR 439 at p 514 that:

> It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

[36] On my part, I am constrained to find against the views of my learned brothers that unless the accused had the opportunity to decide whether or not to call any of these witnesses not called by the prosecution to give evidence on his behalf, there would exist a lingering doubt in the mind of this court whether he had been afforded a fair hearing.

[37] I am acutely aware that the appeal record did not appear to show that the defence had objected to the omission, preferring instead, to submit on the point of drawing adverse inference. I am convinced however, that there was no underlying motive on the part of the defence why the point was not taken at the trial. I am convinced that the omission was due to the failure to appreciate its implication by reason of the unfamiliarity with this aspect of the law by all concerned. Nonetheless, the omission has resulted in a failure of justice and in the words of Sandhawalia CJ in *Madheshwardhari Singh and Anor v State of Bihar* AIR 1986 (Pat) 324, referred to earlier, should lead to *the charges levelled against him (to) fall to the ground* and to result in his *unconditional release*.

I would allow the appeal.

Appeal dismissed.

Reported by Kanesh Sundrum